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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re B.M., a Person Coming Under the Juvenile Court Law.
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B269801

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
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(Los Angeles County  
Super. Ct. No. DK13323)

Plaintiff and Respondent,
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v.
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SONYA G.,
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Defendant and Appellant.
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APPEAL from orders of the Superior Court of Los Angeles County.

Natalie Stone, Judge. Affirmed.

Maureen L. Keaney, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant  
County Counsel, Jessica Paulson-Duffy, Deputy County Counsel, for Plaintiff  
and Respondent.

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Sonya G. (mother) appeals from the orders declaring her infant daughter, B.M., a person described by Welfare and Institutions Code section 300, subdivision (b) as the result of mother's substance abuse and placing B.M. with her non-offending presumed father.<sup>1</sup> Mother contends: (1) the jurisdiction and disposition orders are not supported by sufficient evidence and (2) the juvenile court should have considered less restrictive alternatives than dependency jurisdiction. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Events Leading to Jurisdiction / Detention Hearing*

Mother and father lived together in paternal grandmother's home when B.M. was born in September 2015. Starting in March 2014, mother's three older children (B.M.'s half-siblings) had been the subjects of dependency proceedings in San Bernardino County.<sup>2</sup> By the time B.M. was born in September 2015, the San Bernardino County dependency proceedings as to half-sibling Rudy had been "terminated under home of parent father." M.I. and Y.I. were living with maternal great-grandmother and a review hearing

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<sup>1</sup> All future undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Half-siblings M.I. was born in 2002; Y.I. in 2003 and Rudy in 2011. A January 2002 general neglect referral to the San Bernardino County Department of Children and Family Services (DCFS) regarding M.I. was concluded as "unfounded;" a February 2004 general neglect referral regarding M.I. and Y.I. was concluded as "unfounded;" referrals in September 2013 and January 2014 regarding M.I., Y.I. and Rudy was concluded as "unfounded." But in March 2014, the three half-siblings were detained by San Bernardino County DCFS when mother was caught trying to bring drugs into a drug rehabilitation center for her then boyfriend. Allegations of "[s]evere neglect as to Rudy by mother caretaker incapacity/absence as to Rudy, M.I. and Yesinia," were deemed substantiated by the San Bernardino County juvenile court.

in their dependency case was scheduled for September 15, 2015; San Bernardino County DCFS was recommending termination of mother's reunification services as to M.I. and Y.I. because mother had not complied with the case plan.

B.M. came to the attention of the Los Angeles County DCFS when the hospital where she was born notified DCFS that mother had tested positive for amphetamines, mother admitted a history of drug abuse and that her three older children were the subject of dependency proceedings.<sup>3</sup>

After talking to the San Bernardino County Social worker, the social worker in this case interviewed mother and father at the hospital on September 8 (two days after B.M.'s birth). Mother admitted having a substance abuse problem and said she wanted help; she denied using drugs throughout her pregnancy, but admitted using three days before B.M. was born; she planned on entering a live-in substance abuse program. Father said he knew of mother's drug abuse history but did not know she was currently using; he believed mother was trying to recover and reunify with her other children. Mother and father agreed that mother would move out of father's home so that B.M. could be placed with him. B.M. was detained from mother and released to father that day.

On September 11, DCFS filed a petition alleging dependency jurisdiction under section 300, subdivision (b). As later sustained, that petition reads:

“[Mother] has a history of illicit drug use and is a current user of amphetamine which renders the mother incapable of providing regular care for the child. The child is of such tender age as to require constant care and supervision. The mother used illicit drugs during her pregnancy with the child and had a positive

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<sup>3</sup> The DCFS referral incorrectly stated that *B.M.* had a positive toxicology for marijuana; she did not.

toxicology screen on 9/6/15 for amphetamine, at the time of the child's birth. The child's siblings, M.I. and Y.I. are current dependents of the San Bernardino County Juvenile Court due to the mother's illicit drug use. Such illicit drug use by the mother endangers the child's physical health and safety, and places the child at risk of serious physical harm, damage, and danger."

Thus, section 300, subdivision (b) dependency jurisdiction was based on allegations that: (1) mother had a history of drug use and was currently using drugs, including while pregnant with B.M.; and (2) B.M.'s siblings had been declared dependent children in San Bernardino County dependency proceedings.<sup>4</sup>

At the detention hearing on September 11, the juvenile court found DCFS made a prima facie showing of dependency jurisdiction, father was non-offending and a presumed father. B.M. was placed with father, mother was given monitored visits and ordered to drug test weekly. A jurisdiction/disposition hearing was set for November 2015, then continued to January 2016. Mother was a "no show" at drug tests on October 6 and 21 and November 2, 2015. These "no shows" were equivalent to three positive drug tests. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217)

Mother did not appear at the continued hearing on January 4, 2016, and her appointed counsel did not ask for a continuance. Mother's counsel stated that mother said she would be there by 10:00 a.m. and gave counsel permission to go forward in her absence. There was no live testimony at the hearing. The juvenile court admitted into evidence: (1) the Jurisdiction/Disposition Report filed for the November 2015 hearing (to

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<sup>4</sup> Dependency jurisdiction may be based on "a history of repeated inflictions of injuries on . . . the child's siblings." (§ 300, subd. (a).) It may also be based on abuse or neglect of the child's siblings as defined in subdivision (b). (§ 300, subd. (j).) There were no allegations of dependency jurisdiction under subdivisions (a) or (j).

which the Detention Report was attached), (2) a Last Minute Information for Court Officer filed on the day of that hearing, (3) another Last Minute Information filed in December 2015, and (4) another Last Minute Information filed on the day of the continued hearing. We briefly summarize those documents.

Jurisdiction/Disposition Report

By November 2015, DCFS had not received drug test results for mother. On October 20, the social worker unsuccessfully tried to contact her San Bernardino County counterpart to ascertain the results of the 18-month review hearing as to M.I. and Y.I. DCFS concluded B.M. was at high risk of future abuse and neglect based on her “tender age” (two months old), mother’s drug use, criminal history (including convictions in 2006 for driving under the influence and in 2014 for burglary and possession of paraphernalia) and failure to reunify with B.M.’s half-siblings.

Last Minute Information for Court Officer, November 2015

In telephonic interviews the day before and day of the November jurisdiction hearing, father told the social worker that, as far as he knew, mother was doing her programs and not currently using drugs; father wanted mother to be able to visit so that she could help with B.M.

Last Minute Information for Court Officer, December 2015

Father told the social worker that mother did not have a regular visitation schedule, but visited B.M. whenever she could and paternal grandmother monitored those visits; he still believed mother could safely care for B.M. When the social worker contacted mother by telephone; mother said her phone battery was almost dead and asked if she could call the social worker back; the social worker agreed but mother never called back.

Last Minute Information for Court Officer, January 2016

Mother’s telephone number was no longer in service and the social worker had been unable to contact her.

*B. Jurisdiction Hearing*

As mentioned, there was no live testimony at the jurisdiction hearing. B.M. joined with DCFS in urging the juvenile court to sustain the petition. Relying on *In re David M.* (2005) 134 Cal.App.4th 822 (*David M.*), mother argued the petition should be dismissed because DCFS had not shown a substantial risk of any specific, non-speculative serious harm inasmuch as B.M. tested negative for drugs at birth and had never showed any signs of adverse effects from mother's drug use. The juvenile court was not persuaded. It sustained the petition, observing:

"The fact that the baby tested negative is very, very fortunate, and it's wonderful that the baby is healthy. [¶] However, that doesn't mean that the child would not be at substantial risk of harm from the mother. She has admitted to having a long-standing substance abuse problem. She clearly cannot control herself given that she used while pregnant with this child. And, certainly, her lack of cooperation with the department since the detention, no evidence that she's drug testing or sober now does not give me any reason to believe that she has put this long history of drug abuse behind her. [¶] So I find ample evidence, given the child's very young age, to find that the child's at substantial risk of harm based on mother's history of drug use and current use of meth."

*C. Disposition Hearing*

The court proceeded to disposition. Mother asked for a "home of parents" order. Finding by clear and convincing evidence that B.M. could not safely be returned to mother, the juvenile court ordered B.M. removed from mother and placed with father. Mother was ordered to drug test weekly, attend a full drug/alcohol rehabilitation program and participate in individual counseling. Mother was given one visit per week, to be monitored by father or any DCFS approved monitor.

Mother timely appealed from the jurisdiction and disposition orders.

## DISCUSSION

### A. *Standard of Review*

There are two stages to dependency proceedings under section 300. At the first stage, the juvenile court determines whether the child is subject to juvenile court jurisdiction; DCFS has the burden to prove jurisdiction by a preponderance of the evidence. (§ 355, subd. (a).) At the second stage, the juvenile court must decide where the child will live while under juvenile court supervision; to support removal from parental custody, DCFS has the burden to prove by clear and convincing evidence that there is a risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child's safety. (§ 361, subd. (c); *In re Lana S.* (2012) 207 Cal.App.4th 94, 103, 105; see also *In re D.C.* (2015) 243 Cal.App.4th 41, 51, 54.)

On appeal, we review both the jurisdictional and dispositional orders for substantial evidence. (*In re D.C.*, *supra*, 243 Cal.App.4th at p. 55; *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598.) In doing so, we view the record in the light most favorable to the juvenile court's determinations, drawing all reasonable inferences from the evidence to support the juvenile court's findings and orders. Issues of fact and credibility are the province of the juvenile court and we neither reweigh the evidence nor exercise our independent judgment. (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

### B. *The Jurisdiction Order*

Mother challenges the sufficiency of the evidence to support the jurisdiction order. She argues: (1) a dependency proceeding involving the older siblings was not sufficient evidence that B.M. was a dependent child; (2) the allegation underlying the San Bernardino dependency case – that mother tried to bring drugs to her boyfriend in rehab – does not constitute substance

abuse; (3) the evidence of mother's occasional drug use while not at home was not sufficient evidence of substance abuse; (4) mother's drug use while pregnant with B.M. did not cause B.M. any injury; and (5) mother's failure to return the social worker's telephone calls did not constitute "uncooperativeness." We find no error.

1. Governing legal principles

Section 300, subdivision (b)(1) describes various circumstances that may lead to dependency jurisdiction. Relevant here is when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse." The three elements to a jurisdictional finding under section 300, subdivision (b) are: (1) neglectful conduct by the parent (in this case substance abuse); (2) causation; and (3) "serious physical harm or illness" or a "substantial risk" of serious physical harm or illness. The "harm" element requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future. (*In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1452.)

To satisfy the "neglectful conduct" element, there must be a finding that the parent is a "substance abuser;" mere drug use is not sufficient. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764.) *Drake M.* proposed a definition of "substance abuse" based on the description of the condition in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000) (DSM-IV-TR). In *In re Christopher R.*, *supra*, 225 Cal.App.4th at page 1218, the court recognized the *Drake M.* formulation as useful, but held it was "not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court . . . ." Even if it fell



outside the DSM-IV-TR definition, *In re Christopher R.* found the mother's "use of cocaine while in the final stage of her pregnancy, combined with her admitted use of the drug in the past and her failure to consistently test or enroll in a drug abuse program, justified the juvenile court's exercise of dependency jurisdiction over her children." (*Id.* at pp. 1218-1219.)

As a general rule, a parent's drug abuse does not bring a child within dependency jurisdiction absent evidence that such conduct causes "a specific, nonspeculative and substantial risk to [the child] of serious physical harm." (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003, citing *David M.*, *supra*, 134 Cal.App.4th at p. 830.) But drug abuse by a parent of a child under six years old is prima facie evidence of that parent's inability to provide regular care resulting in a substantial risk of harm. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1385, citing *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1220; *In re Drake M.*, *supra*, 211 Cal.App.4th at p. 767 [same].)

## 2. Analysis

Here, the evidence that mother had a history of substance abuse included her admission of such to the hospital staff and to the DCFS social worker at the hospital. This was corroborated by father's statements to the social worker. That mother's substance abuse problem was unresolved at the time of the January 2015 jurisdiction hearing can be seen by the evidence that she used methamphetamine while pregnant with B.M. (just four months before the hearing), was a "no show" at three drug tests and had not entered a drug rehabilitation program. Under *Christopher R.*, this constituted sufficient evidence of substance abuse. Under *Kadence P.*, because B.M. was an infant, mother's substance abuse was prima facie evidence of mother's inability to provide regular care resulting in a substantial risk of harm to

B.M. The juvenile court could reasonably find father's statements to the social worker that he believed mother could safely care for B.M. insufficient to rebut that prima facie showing. We find telling mother's failure to appear at the jurisdiction hearing, thus depriving the juvenile court of the opportunity to observe mother's demeanor in making its assessment of whether she could safely care for B.M.

Because there was substantial evidence that B.M. was at risk of harm from mother's substance abuse, we need not consider whether dependency jurisdiction could also be based on the San Bernardino County dependency proceedings involving the half-siblings. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

*C. The Disposition Order*

Mother challenges the sufficiency of the evidence to support the disposition order removing B.M. from mother's custody. She argues there was not clear and convincing evidence of a substantial danger to B.M.'s health, safety, protection or physical or emotional well-being if B.M. were returned to mother. We disagree.

Custody of a dependent child may not be taken from the custodial parent "unless the juvenile court finds clear and convincing evidence of . . . a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . ." (§ 361, subd. (c)(1).)

There was substantial evidence supporting the disposition order removing B.M. from mother's custody and limiting mother to supervised visits. B.M. was just four months old at the time of the January 2016

hearing. Nothing suggests mother had changed from her substance abuse ways. She had no negative drug tests, her three missed tests were the equivalent of positive tests, and she was not participating in drug rehabilitation. Father told the social worker that he believed mother was no longer using drugs, but father had mistakenly believed she was not using while pregnant with B.M. The juvenile court could not consider mother's demeanor in assessing whether she was currently using drugs because mother did not appear at the hearing. This record supports the juvenile court's finding by clear and convincing evidence that B.M. could not be safely returned to mother's custody.

*D. Less Restrictive Alternative*

Mother contends it was an abuse of discretion for the juvenile court to not order voluntary maintenance services in accordance with section 301, a less restrictive alternative to dependency jurisdiction, removal and a formal reunification plan. We disagree.

“Once the juvenile court finds jurisdiction under section 300, it must adjudicate the child a dependent unless the severity of the case warrants nothing more than Agency's supervision of family maintenance services. Under section 360, subdivision (b), if appropriate, the court may, without adjudicating the child a dependent, order that services be provided to keep the family together under the informal supervision of the child welfare agency. (§§ 360, subd. (b), 301; Cal. Rules of Court, rule 5.695(a)(2).)” (*In re N.M.* (2011) 197 Cal.App.4th 159, 171.)

It is within the juvenile court's discretion whether to proceed under section 360, subdivision (b) and we will not interfere with the exercise of that discretion absent a clear showing of abuse. (*In re N.M., supra*, 197 Cal.App.4th at p. 171.) In this respect, as in others, a “court exceeds the

limits of legal discretion if its determination is arbitrary, capricious or patently absurd. The appropriate test is whether the court exceeded the bounds of reason. [Citation.]” (*Ibid.*) For the reasons we have stated already, we find no abuse of discretion here.

**DISPOSITION**

The orders are affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.